Exhibit A
to SCE Comment Letter on OTC Policy
April 13, 2010

I. A Section 316(b) Policy That Neither Balances Costs and Benefits Nor Provides Relief In The Face of Extreme Disparities Between Costs and Benefits Is Arbitrary and Capricious.

By eliminating the "wholly disproportionate" cost-benefit provision of the Policy, the Board arbitrarily and capriciously has set aside decades of EPA and federal court precedent, which culminated in the U.S. Supreme Court's seal of approval in the *Entergy* decision, and otherwise is proceeding contrary to law. The Policy relies on an unproven "cost/cost" legal scheme. *Entergy* suggests a cost/benefit balancing test is necessary under Clean Water Act ("CWA") Section 316(b). *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1510 (2009). The California Office of Chief Counsel identified the "wholly disproportionate" cost-benefit test as a "basic" element of Section 316(b) and the Board has not adequately justified its sharp departure from past practice. The Board's apparent reliance on similar cost/cost provisions in the EPA's Phase I and II (suspended) Rules is misguided and arbitrary and capricious. Neither the special studies nor cost/cost test guard against irrational results. The Board's approach is unlawful.

A. Section 316(b) arguably makes it arbitrary and capricious to impose wet cooling towers when there is an extreme disparity between the cost of such and the environmental benefits to be gained.

1. *Entergy* strongly suggests a balancing test is necessary under Section 316(b)

The Policy allows for irrational results, is arbitrary and capricious, and contravenes Section 316(b) by not including a means to account for extreme disparities between costs and benefits. The *Entergy* decision summarized the EPA's long history of weighing costs against benefits to avoid irrational results: "As early as 1977, the agency determined that, while [Section 316(b)] does not require cost-benefit analysis, it is also not reasonable to interpret Section [316(b)] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *Entergy*, 129 S. Ct. at 1509 (internal quotations and citations omitted). The Court explained that the EPA sought to "avoid extreme disparities between costs and benefits." *Id*. The Supreme Court reasoned, "[w]hile not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years." *Id*.

Entergy strongly suggests that Section 316(b) mandates a substantive balancing of costs against benefits to avoid irrational results, or to avoid "extreme disparities between costs and benefits." *Entergy*, 129 S. Ct. at 1509. The Court said that "the statute's language is plainly not so constricted as to require EPA to require industry petitioners to spend billions to save one more fish or plankton." *Id*. at 1510. (internal quotations and

citations omitted). Justice Breyer in his concurring opinion reasoned, "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs. Moreover, an absolute prohibition would bring about irrational results." *Id*. at 1513 (Breyer, J., concurring in part and dissenting in part). These statements strongly suggest that Section 316(b) requires a substantive balancing test, or a weighing of advantages against disadvantages, to avoid extreme disparities between costs and benefits or irrational results.

By eliminating the time-tested "wholly disproportionate" cost benefit test (as affirmed in substance by *Entergy*), and failing to replace it with some other benefits analysis by an objective standard, the Policy is rendered arbitrary and capricious. By proposing to weigh the cost the Board contemplated when designing the policy against the costs as substantiated by the special study for the nuclear plants, the policy eliminates the weighing of the advantages of retrofitting cooling towers against the disadvantages and thus departs from the essence of the reasonableness test in Entergy. Without such a cost compared to benefits test, the policy cannot assure that it will arrive at a reasonable result.

2. California law requires the Board to balance economics against environmental benefits.

The Porter-Cologne Act obligates the Board to consider economics when it establishes policies to enhance water quality objectives, and the objectives adopted must be reasonable and achievable. *See* Water Code §§ 13000, 13241. The Act's legislative history makes clear that economics must be balanced against environmental benefits:

> "The regional boards must *balance* environmental characteristics, past, present and future beneficial uses, and *economic considerations* (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is *reasonable*."[1]

Balancing, by its nature, requires a weighing of the costs to implement the proposed policy against the benefits to be achieved. The Board must safeguard not only the environment, but also the public's economic interests:

> "The key to the *proper balancing* of these interests lies only partly in established statewide policy. The regional and state boards which, in their decisions in which policy is

[1] See Attachment 1, State Water Resources Control Board, *Final Report of the Study Panel of the California State Water Resources Control Board* ("Study Panel Report") at 1 (1969) (emphasis added); Attachment 2, State Water Resources Control Board, Order WQ 2001 - 15 at 12 (2001) ("The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act.").

> applied to specific cases, *weigh the benefits and costs* to society, are the ones who actually determine this *balance*."[2]

Any lawful policy must satisfy these provisions of state law as Section 316(b) plainly allows substantive balancing, weighing of costs and benefits, economic analysis, and the assurance of reasonable and rational results. (As discussed *infra*, Section I.D, it appears that the Board is without statutory authority in the first instance to regulate OTC intake structures at existing power plants that are not being expanded. That argument provides an alternative Porter-Cologne basis for finding the Policy unlawful.) A "wholly disproportionate" cost-benefit test satisfies these applicable state-law requirements. *See Entergy*, 129 S. Ct. at 1509. The Policy proposes to eliminate the Board's primary method for weighing benefits and costs without providing a new substantive standard that satisfies the Porter-Cologne Act. It therefore violates state law. As discussed below, neither the cost/cost test nor the special studies provision accounts for a facility-specific weighing of costs against benefits.

3. The "wholly disproportionate" cost-benefit test is a "basic step" under Section 316(b), the elimination of which violates Section 316(b).

The Board's Office of Chief Counsel previously opined that for "over 25 years EPA has applied the 'wholly disproportionate' cost test to BTA determinations. *A technology may not be considered BTA* if the cost of a technology is wholly disproportionate to the environmental benefit to be gained." *See* Attachment 3, Office of Chief Counsel, Legal Analysis of Clean Water Act Section 316(b), Hearing on NPDES Permit For Diablo Canyon Power Plant, Pacific Gas & Electric Company (PG&E) (June 11, 2003), at 4 (emphasis added). The opinion calls the "wholly disproportionate cost test" one of "four basic steps in the Best Technology Available analysis." *Id*. at 1. The opinion does not appear to leave any discretion to exclude the "wholly disproportionate" cost-benefit test or consider BTA where costs are wholly disproportionate to benefits.

In the Diablo Canyon proceedings, the Office of Chief Counsel established the "wholly disproportionate" cost-benefit test as an element of BTA. The Policy does not include this element and, thus, is not BTA and violates Section 316(b). In essence, a technology is neither the "best" not "available" if its costs are wholly disproportionate to the benefits to be achieved.

B. The Board's elimination of the "wholly disproportionate" cost-benefit test and sharp departure from its previous position are arbitrary and capricious.

The Board has not provided a legally cognizable basis for its break from its prior position, rendering the Board's action arbitrary and capricious. *See National Cable & Telecommunications Ass'n v. Brand X Internet*, 545 U.S. 967, 981 (2005) (unexplained inconsistency with prior agency interpretation of a statute is "a reason for holding an

[2] *See* Study Panel Report, *supra*, at 7 (emphasis added).

interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

As an additional example of how well-established the Board's position was with regard to the "wholly disproportionate" cost-benefit analysis, long before the Moss Landing power plant case now currently before the California Supreme Court reached the courts, petitioner Voices of the Wetlands' petitioned the Board to review the Central Coast Regional Board's application of "wholly disproportionate" cost-benefit BTA analysis. Rejecting the petition, the Board concluded that "it failed to 'raise substantial issues that are appropriate for review.'" See Attachment 4, Attorney General's Answering Brief on the Merits of Respondent California Regional Water Quality Control Board, Central Coast, Voices of the Wetlands v. California State Water Res. Control Bd., No. S160211, March 8, 2010 (2010 WL 1229127 at *10 (Cal.)) ("Attorney General's Answering Brief").

Accordingly, given the Board's long (and recent) history of applying a substantive balancing test under Section 316(b), the Board must meet a heightened standard to explain its sudden policy break. *See Entergy*, 129 S. Ct. at 1515 (Breyer, J., concurring in part and dissenting in part) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524 (1994) (Thomas, J., dissenting) ("[J]udges are properly suspect of sharp departures from past practice that are as unexplained as the [agency's] in this case").

The revised Draft Final Substitute Environmental Document ("SED") offers a short discussion on the cost/cost test that does not provide an adequate rationale for the change in policy. The SED states, without substantiation or reference, that the "wholly disproportionate" cost-benefit test would:

- "introduce a burden on Regional Boards" and
- involve "the inherent problem of monetizing the value of marine life at the individual and ecological scales."[3]

Neither argument justifies abandoning 30 years of agency practice. The Board does not explain what special burden would be imposed over and above that carried by EPA and the Regional Boards over the last 30 years. Plainly, that burden has been manageable. In the absence of that explanation, this basis is arbitrary and capricious. The Board could alleviate any such burden by undertaking the cost/benefit analysis itself, just as it proposes to implement the cost/cost test itself. The Board does not state that it would be a burden for it to apply the test. In essence, the Board is asserting a lack of agency resources and/or administrative convenience as a basis to break sharply with prior policy and also to deny its legal obligations. This is unlawful.

[3] SED, p. 93.

On the second point, the science of monetizing environmental benefits is proven and well established, having been utilized by regulatory agencies for many years under a variety of environmental regulatory schemes.[4] Potential uncertainties identified in the SED, such as valuing non-recreational or non-commercial species, can readily be addressed by economic modeling and analysis.[5] As a case in point, the Attorney General's Answering Brief in the *Voices of the Wetlands* case currently before the California Supreme Court states, "[a]lthough the details are complex, the basics of the method the Board used to estimate the benefits are fairly straightforward."[6] The Board has acted in an arbitrary and capricious fashion by not offering a rational basis explaining its sharp departure from prior policy.

C. The cost/cost test does not guard against irrational results, rendering the Policy arbitrary and capricious.

The Policy fails to include a balancing test to guard against irrational results, rendering it arbitrary and capricious; the cost-cost test set forth in Section 3.D.(8) does not cure this legal infirmity. The word "benefit" is entirely absent from Sections 3.D.(7) and 3.D.(8) of the Policy. While the special studies would consider several factors under Section 3.D.(7), there is no obligation for the Board to consider how much benefit will be achieved or to weigh costs against benefits. Section 3.D.(8) provides that alternative measures shall be established if the costs of compliance are wholly out of proportion to the costs considered by the Board in establishing Track 1, but there is no requirement for the Board to consider whether those costs have any rational basis considering the benefit to be gained.

Without the common-sense balancing practiced by the EPA, supported by *Entergy*, and required by the federal Clean Water Act and Porter-Cologne Act, there is no rational limit to what BTA could be required, potentially leading to absurd results—an arbitrary and capricious application of Section 316(b). In conflict with *Entergy*, the Policy could require "spend[ing] billions of dollars to save one more fish or plankton" because environmental benefits are untethered from BTA. *See Entergy*, 129 S. Ct. at 1509, 1513. In conflict with the Porter-Cologne Act, the abandonment of the "wholly disproportionate" cost-benefit test eliminates the Board's ability to "weigh the benefits and costs" to ensure "reasonable" results.[7]

[4] See Attachment 5, Comment Letter by Professor David Sunding, dated April 13, 2010, for specific discussion on the history and validity of the science of monetizing environmental benefits.
[5] See id.
[6] See Attachment 4, Attorney General's Answering Brief at *32-37.
[7] *See* Water Code §§ 13000, 13241.

1. Reliance on EPA's Phase I and II rules is misguided; the elimination of the "wholly disproportionate" cost-benefit test lacks a rational basis.

a) The Phase I rule excluded the "wholly disproportionate" cost-benefit test for reasons not applicable to existing facilities.

The EPA carefully selected the cost/cost test in the Phase I Rule and decided not to include a cost/benefit test for new facilities because of well-recognized differences between new and existing facilities, both in terms of cost and the ability to estimate impingement and entrainment rates.

First, with regard to cost, the EPA noted: "Historically, [the] wholly disproportionate [cost-benefit test]…involved existing facilities that have been required to retrofit…[which] often meant requiring the installation of cooling towers along with necessary modifications to the plant and significant capital expenditures and down time required for installation. In contrast, new facilities would not incur retrofit costs." *See* Attachment 6, 65 Fed. Reg. 49,094 (Aug. 10, 2000). Further, "new facilities would incur only the cost of any incremental difference between their planned cooling water intake structure technology and that required…EPA concludes that these incremental costs are unlikely to be large." *Id.* Thus, the EPA did not reject the use of the "wholly disproportionate" cost-benefit test in general, but only determined it was inappropriate for new facilities. The cost/cost test was developed as a check against this assumption that "costs are unlikely to be large" for new facilities. *See id.*

Second, with regard to anticipated environmental impacts, the EPA further clarified that: "A limitation of using the 'wholly disproportionate' test for new facilities,…is that the impingement and entrainment estimated before a facility is built can be very imprecise. . . . Because of the difficulty in prospectively estimating impingement and entrainment rates at new facilities, EPA has chosen not to use the wholly disproportionate cost test to estimate the impact of today's proposal." *See* Attachment 6, 65 Fed. Reg. 49,094-95 (Aug. 10, 2000).

The Policy is not supported by the Phase I Rule's exclusion of the "wholly disproportionate" cost-benefit test because the EPA based its approach on differences between new and existing facilities. The rationale used to eliminate the "wholly disproportionate" cost-benefit test for new facilities is not relevant to existing facilities, rendering the Board's apparent reliance on the Phase I Rule arbitrary and capricious.

b) Unlike the Phase I rule, the Policy is vague and ambiguous regarding whether it allows alternative methods of compliance based solely on non-monetary factors.

The Phase I Rule cost/cost test is two-pronged. Alternative BTA compliance is available if the applicant shows either: (i) compliance costs are wholly out of proportion to the costs considered by the EPA; or (ii) compliance would cause significant adverse impacts to local air quality, local water resources or local energy markets. *See* 40 C.F.R. § 125.85. Thus, relief can be granted based solely on environmental factors, even if compliance costs are not out of proportion with the costs considered by the EPA.

In contrast, the Policy is vague and ambiguous regarding whether non-monetary factors identified in Section 3.D.(7) alone would allow alternative methods of compliance. As currently written, it appears that the factors in Section 3.D.(7) are only applicable to the extent they demonstrate compliance costs are wholly out of proportion to costs considered by the Board. The State Water Board has provided no rational basis for applying a more stringent standard to existing facilities than the EPA applied to new facilities in the Phase I Rule by allowing alternative compliance measures based on non-monetary factors. Failure to provide relief when technology would result in "significant adverse impacts" is arbitrary and capricious, and an unlawful construction of Section 316(b) which requires environmental impact to be minimized.

c) EPA's Phase II rule included both a cost/benefit test and a cost/cost test, which applicants could pursue simultaneously; failure to include a similar balancing test renders the Policy unlawful.

EPA's Phase II Rule (suspended; applicable to existing facilities) was designed to allow an applicant to obtain alternative methods of compliance by showing either: (i) compliance costs were significantly greater than those determined by the EPA; or (ii) compliance costs were significantly greater than environmental benefits. Although the *Entergy* decision approved EPA's use of the cost/benefit test, in *Riverkeeper II* the Second Circuit remanded the cost/cost test to the EPA for procedural reasons without considering the test on its merits. *Riverkeeper, Inc. v. EPA*, 475 F. 3d 83 (2d Cir. 2007) ("*Riverkeeper II*"). Thus, the cost/cost test for existing facilities has not been judicially reviewed for compliance under Section 316(b).

For existing facilities, the EPA recognized that, even if a cost/cost test is employed, a cost/benefit test guards against irrational results where little environmental benefit would be gained. *See* Attachment 7, 69 Fed. Reg. 41,627 (Jul. 9, 2004). EPA recognized that some existing facilities would have site-specific characteristics that would necessitate alternative means of compliance to avoid economically impractical or irrational results. *See id.* Thus, the suspended Phase II Rule does not support the Policy's exclusion of the "wholly disproportionate" cost-benefit test. The State Water Board has presented no rational basis for excluding a substantive balancing test to avoid irrational results.

D. The Policy is unlawful as it is not an action required by the federal Clean Water Act and has no basis under state law, which does not authorize the Board to regulate intakes of existing power plants that are not being expended.

The federal Clean Water Act does not require the Board to adopt a Section 316(b) policy. It is perfectly lawful for Regional Boards to continue to apply Section 316(b) exercising their Best Professional Judgment ("BPJ") during NPDES permit proceedings. No court has ordered the Board to adopt a Section 316(b) policy. The failure of the Policy to consider benefits or feasibility plainly makes it more stringent than federal law, and is not mandated by federal law. Accordingly, the Board must have some independent policy basis under state law to promulgate the Policy because it is clearly not an action "required under" the CWA. *See* Water Code § 13372(a) ("The provisions of this chapter [implementing the CWA] apply only to actions *required under* the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto.") (Emphasis added.) The Porter-Cologne Act contains no such statutory basis and does not authorize the Board to regulate OTC structures at existing power plants that are not being expanded. Thus, since the Policy does not limit its application to existing OTC structures when the plants are being expanded, it is unlawful.

This situation can be contrasted to the Policy's express limitations with regard to ocean desalination plants that are co-located with existing OTC intakes. In discussing these kinds of plants, the Board acknowledges that it would need an "independent policy basis" to regulate such desalination plants since they are not governed by Section 316(b). SED, p. 57. The Board has a similar burden to provide an "independent policy basis" to regulate existing OTC intakes at power plants that are not being expanded. The Board has not met that burden, and indeed is without statutory authority to regulate OTC intakes when there is no power plant expansion.

The Board long has recognized that Chapter 5.5 of the Porter-Cologne Act contains only authority coextensive with minimal federal requirements. In a report submitted to the Governor during the legislative process leading to the enactment of Chapter 5.5, the Board stated in pertinent part:

> As amended November 17, the bill contains and is limited to the mandatory provisions of the [Clean Water Act] which are conditions precedent to California - not the federal Environmental Protection Agency (EPA) - continuing to regulate the discharge of waste into the navigable waters of the State. Section 13372 expressly limits the provisions of AB 740 to actions required under the [Clean Water Act], as amended.

See Attachment 8, AB 740 (now Ch. 5.5), Enrolled Bill Report, State Water Resources Control Board, Dec. 5, 1972. This Bill Report, which is dated just 14 days prior to the effective date of Chapter 5.5, is direct evidence of what the Board understood of Chapter 5.5's scope at the time of its adoption and is entitled to "great weight." *Kaiser*

Foundation Health Plan, Inc. v. Lifeguard Inc., 18 Cal. App. 4th 1753, 1764 (1993). As explained by the court in *Kaiser Foundation Health Plan*, enrolled bill reports written by a state agency charged with implementing a particular statute are particularly significant when written contemporaneously with that statute's effective date:

> The DOC's interpretation [contained in its enrolled bill report] supports [appellant's] argument and it is entitled to great weight. Contemporaneous construction of a new enactment by an agency charged with its enforcement is persuasive, if not controlling. The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men [and women] who probably were active in the drafting of the statute.

Id. (internal citations and quotations omitted).[8] The Board's conclusion made contemporaneously with Chapter 5.5's adoption that its scope is limited to the "mandatory provisions" of the Clean Water Act which are "conditions precedent" to California regulating its own waters is an important piece of legislative history.

That the State's authority under Chapter 5.5 is limited to what is required by the federal CWA was affirmed by a 1989 case in which the Board itself argued that permits authorized under Chapter 5.5 corresponded to those satisfying the "minimum requirements of the federal mandate." *Tahoe-Sierra Preservation Council v. State Water Res. Control Bd.*, 210 Cal. App. 3d 1421, 1431 (1989). The *Tahoe-Sierra* case recognized that for purposes of Chapter 5.5, the term "waste discharge requirements" means NPDES permits meeting the "minimum requirements of the federal mandate." *Id.* ("the equivalency contemplated by Section 13374 'shall apply only to *actions required* [of the states] under the [Clean Water Act] . . . .'"); Water Code §§ 13372, 13374; *see also Committee for a Progressive Gilroy v. State Water Res. Control Bd.*, 192 Cal. App. 3d 847, 862 (1987) (CEQA exemption did not apply to permitting actions taken under Porter-Cologne sections that were not derivative of the Clean Water Act).

The only provision of Porter-Cologne authorizing the Board to regulate power plant intake structures is Water Code Section 13142.5(b). Contrary to the Board's interpretation of this section, the Porter-Cologne Act does not authorize the Board to

[8] Enrolled bill reports prepared by executive branch agencies are entitled to significant consideration when they are authored by the agency charged with implementing the statute, contain interpretive statements made contemporaneously with a statute's adoption, and are consistent with other legislative materials such as bill reports or the plain language of the statue itself. Compare *Kaiser Found. Health Plan*, 18 Cal. App. 4th at 1764, with *People v. Allen*, 88 Cal. App. 4th 986, 995, n. 19 (2001) (While enrolled bill reports prepared by the executive branch for the Governor do not necessarily demonstrate the Legislature's intent, they can corroborate the Legislature's intent, as reflecting a contemporaneous common understanding shared by participants in the legislative process from both the executive and legislative branches.") (citation omitted).

regulate existing power plants that are not "new" or being "expanded." Water Code Section 13142.5(b) authorizes the Board to require the use of the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life for "each new or *expanded* coastal powerplant . . . using seawater for cooling, heating, or industrial processing..." *Id.* (emphasis added).

The Board asserts that it "remains unclear" whether the term "expanded" is ambiguous, and could be read to mean an "existing" power plant, as defined under 40 C.F.R. § 125.83 (e.g., any power plant constructed prior to January 17, 2002). SED, p. 49. This is the Board's sole basis to claim that it can regulate existing power plant intake structures. In fact, Section 13142.5(b) does not apply to "existing" OTC power plants, absent some sort of development. Any other interpretation contravenes the plain meaning of the word "expanded" and violates legislative intent.

The fundamental rule of statutory construction is that the court should ascertain the intent of the legislature so as to effectuate the purpose of the law:

> In determining [Legislative] intent, [courts] first examine the words of the statute itself.... Under the so-called plain-meaning rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning.... However, the plain-meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose.... If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved under the legislative history.

In re Marriage of Hobdy, 123 Cal. App. 4th 360, 366 (2004) (internal citations and quotations omitted). By using the term "expanded" in Section 13142.5(b), the Legislature did not intend to include all "existing" plants. Webster's Ninth New Collegiate Dictionary defines the word "expand" as "to open up; unfold; to increase the extent, number, volume, or scope of; enlarge....". In contrast, "exist" is defined as, "to have real being in space and time." By the plain meaning of these words, in order to qualify as an "expanded" plant subject to Section 13142.5(b), an increase or enlargement of the OTC power plant of some kind must take place.

Section 13142.5(d) shows that the Legislature knew the difference between the terms "existing" and "expanded," and understood how to choose the appropriate term. The section also clarifies that some development is required before an existing plant can be called an "expanded" plant under subsection (b).

Subsection (d) states: "[i]ndependent baseline studies of the *existing* marine system should be conducted in the area that could be affected by a *new or expanded* industrial facility using seawater in advance of the *carrying out of the development*." (emphasis added). In this context, it is clear that the Legislature intended the word "existing" to carry its usual and customary meaning – a conclusion made even more

certain by the fact that "existing marine system" is captured by "baseline studies." *Id.* Subsection (d) also proves that the Legislature intended there to be some sort of "development" that could cause some new effect on the "existing" marine environment before requiring that an "expanded" plant comply with Section 13142.5(b).

Canons of statutory construction require courts to harmonize statutes, "both internally and with each other, to the extent possible. Interpretations that lead to absurd results or render words surplusage are to be avoided." *In re Marriage of Hobdy*, 123 Cal. App. 4th at 366 (internal quotations and citations omitted). Here, interpreting the word "expanded" in subsection (b) to be the equivalent to "existing" in subsection (d) would result in an absurd result.

Section 13142.5(b) is the only part of the Porter-Cologne Act that can be construed as regulating OTC intake structures. "[W]hen a particular class of things modifies general words, those general words are construed as applying only to things of the same nature or class as those enumerated." *People v. Arias*, 45 Cal. 4th 169, 180 (2008). Here, the general terms found in the Porter-Cologne Act regarding water quality cannot support an attempt by the Board to regulate OTC intake structures, where Section 13142.5(b) so specifically addresses the issue.

In sum, the Board's authority to regulate existing OTC intake structures is limited to CWA Section 316(b), unless the plants with the OTC intakes are undergoing "development" sufficient for them to qualify as an "expanded coastal power plant." The Policy is far more stringent than that permitted under the CWA, however. Therefore, the Policy is without statutory basis and is unlawful.

E. The SED does not satisfy CEQA's requirements to analyze and mitigate significant environmental impacts; the SED must be revised and recirculated for a new 45-day public comment period.

1. The SED must be revised and recirculated to cure CEQA deficiencies

Under CEQA, recirculation is required where "significant new information" has been added to an EIR or an equivalent document (such as an DSED), which has been made available for public review, but not yet certified. *See* Cal. Code Regs., tit. 14 ("CEQA Guidelines") § 15088.5(a). "[I]nformation" can "include changes in the project or environmental setting as well as additional data or other information." *Id.* New information is "significant" when "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." *Id.*

The revised Policy would trigger new significant environmental impacts that have not been analyzed, disclosed or mitigated by the SED. The removal of the "wholly disproportionate" cost-benefit demonstration will increase the likelihood that cooling

towers will be required for the nuclear facilities and combined cycle units.[9] The elimination of the "wholly disproportionate" cost-benefit demonstration also represents a significant shift in the Policy.[10]

Given the significant new information and changes to the Policy, CEQA requires a notice and comment period for the recirculated SED. *See* CEQA Guidelines §§ 15088.5(d) ("Recirculation of an EIR requires notice pursuant to Section 15087, and consultation pursuant to Section 15086."); 15088.5(f) (response to comments required pursuant to CEQA Guidelines § 15088). Unless the SED is revised and recirculated, the Board is not proceeding in a manner required by law. *See Mountain Lion Found. v. Fish and Game Comm'n,* 16 Cal. 4th 105, 137 (1997) (overturning environmental document prepared pursuant to a certified regulatory program).

Typically, the public comment period must be at least 45 days for projects of statewide importance. Public Resources Code § 21091(a); CEQA Guidelines § 15105(a) Here, the revised SED was issued on March 22, 2010. Public comments are due on April 13, 2010, providing only a 22-day public comment period. Accordingly, the State Water Board has failed to provide the lawfully required comment period.

Furthermore, SCE notes that the Board published the SED without a redline showing changes made to the July 2009 draft. This failure to elucidate changes prohibits the public from meaningful opportunity to comment on the SED, also requiring recirculation after publication of a redlined SED. *See* CEQA Guidelines § 15088.5(a). Despite the fact that the SED claims that staff responded to public comment in Appendix G to the SED, no such Appendix has been published.[11]

2. The SED does not satisfy CEQA by neglecting analysis of potential mass retirement of OTC power plants

The SED does not address indirect environmental impacts associated with the potential mass retirement, repowering, or transmission line upgrades that may result from the Policy.[12] According to the SED, the Policy will at a minimum require new transmission lines to address plant retirements, plant shutdowns during retrofit, and reduced generation potential after installing cooling towers.[13] There is also an "unlikely" possibility that the Policy could trigger a mass retirement of power plants that "would require no less than a *WWII-like mobilization effort* to locate and site combustion turbines, the only type of plant that could be placed on-line in such a short time-frame, while *also enacting emergency conservation measures*."[14] The SED does not consider whether the exclusion of the cost/benefit test would make this outcome more likely

[9] *See* SCE's comment letter dated December 8, 2009, Exhibit A. These comments remain applicable to the current version of the SED and are fully incorporated by reference herein.
[10] *See* SED, pp. 13-14.
[11] SED, p. 12; *see* http://www.waterboards.ca.gov/water_issues/programs/npdes/cwa316.shtml#otc (last visited April 13, 2010).
[12] *See* Environ Report, pp. 17-18.
[13] SED, p. 118.
[14] *Id*. at 119.

because the nuclear facilities may be at a greater risk of being shut down. The SED also does not acknowledge that the Board has no authority to facilitate a "WWII-like mobilization effort" because it lacks the authority to site new power plants, approve transmission line upgrades, or enact emergency conservation measures.

The SED does not evaluate the indirect environmental impacts of either the expected transmission line upgrades or the possible mass retirement.[15] The SED contains a single paragraph discussion about potential impacts, but largely defers the analysis to future approvals. Although the SED claims to be a programmatic document, the Board cannot avoid a detailed analysis of reasonably foreseeable environmental impacts by labeling the SED as "programmatic." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 429 (2007) ("tiering is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause"). The SED unlawfully has deferred the analysis of these impacts.

CEQA and the Board's regulations require a reasonable range of project alternatives. *See* CEQA Guidelines § 15126.6; Cal. Code Regs. tit. 23, § 3777(a)(2); Pub. Res. Code § 21159. Although no "worst case" scenario is required by CEQA, the mass retirement of coastal power plants appears to be a reasonable, albeit unlikely, scenario. Given the potential emergency-like conditions that could result, the SED is deficient without an alternative analysis that considers the mass retirement of coastal power plants because of the Policy.

3. Prior CEQA comments have not been addressed; the SED does not satisfy CEQA mandates or the State Water Board's CEQA regulations

On September 30, 2009, SCE provided detailed comments on the CEQA deficiencies of the SED, as supported by an attached technical report prepared by Environ Corporation (July 2009) ("Environ Report"). SCE's prior comments and the Environ Report demonstrate that the Policy would result in numerous significant environmental impacts that were not fully analyzed in the SED. The Policy has since been revised to eliminate the use of the "wholly disproportionate" cost-benefit test, likely increasing the potential for significant environmental impacts.[16] The revised SED does not address SCE's prior CEQA comments or the Environ Report;[17] these comments remain applicable to the current version of the SED, are fully incorporated by reference herein, and SCE requests that the Board address all the comments in the Final SED.

The following previously identified CEQA deficiencies demonstrate the incomplete nature of the SED and its failure to analyze and mitigate significant

[15] The SED notes that the extreme scenario would require "as many as 800 new small power plants," which likely would result in significant environmental impacts. SED, p. 120; *see* Environ Report, pp. 17-18.
[16] *See* SCE's comment letter dated December 8, 2010, Exhibit A. These comments remain applicable to the current version of the SED and are fully incorporated by reference herein.
[17] The Board does not identify the specific changes in the current SED, making it difficult for the public to evaluate changes to the current SED and the environmental effects of the current Policy.

environmental impacts associated with the Policy. Unless these deficiencies are resolved, it will be impossible for the public or decisionmakers to effectively understand impacts associated with the Policy. These defects are material and prejudicial because the SED must be prepared with a sufficient degree of analysis to provide decisionmakers with the information needed to make an intelligent judgment about the project's environmental impacts. *See Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors*, 91 Cal. 4th 342, 356 (2001).

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  - The Environ Report demonstrates that significant environmental impacts are associated with adding cooling towers at the regulated facilities. The elimination of the "wholly disproportionate" cost-benefit test likely increases the potential for significant environmental impacts not analyzed by the SED related to climate change, air quality, utilities and system reliability, noise, aesthetics, and biological resources.

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  - The SED is materially defective for failing to evaluate and disclose numerous potentially significant environmental impacts related to the following environmental issue areas:

    - Air Quality – SED does not compare Policy emissions against established CEQA significance thresholds; SED's methodology to estimate Policy emissions appears to be seriously flawed; SED does not analyze potential health hazards associated with Policy emissions; and SED does not develop adequate emissions estimate

    - GHG Emissions – The SED does not provide a meaningful evaluation of Policy-related GHG emissions.

    - The Environ Report identifies additional significant impacts not analyzed in the SED, related to aesthetics, noise, biological resources, water and aquatic ecology, utilities and system services.

  - The SED is materially defective by limiting its assessment of cumulative impacts to a one-sentence conclusory statement.

  - The SED is materially defective by failing to analyze the environmental impacts associated with a reasonable range of alternatives and by failing to analyze environmental impacts associated with the mandated "no project" alternative.

- The Board did not satisfy its obligation under Public Resources Code Section 21159 to analyze reasonably foreseeable methods of compliance and environmental impacts at the time of adoption of the Policy.

- The SED is materially defective by failing to analyze significant inconsistencies with existing law, regulations, and policies, including A.B. 32 and the California Air Resources Board (CARB) Scoping Plan.

- The Board has two narrowly prescribed certified regulatory programs, neither of which covers the Policy. *See* CEQA Guidelines §§ 15251(g), 15251(k). In the absence of the shelter of a certified regulatory program, the Board must complete a full EIR. *See Citizens for Non-Toxic Pest Control v. Dept. of Food & Agric.*, 187 Cal. App. 3d 1575, 1588 (1987).

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  - The Board oversimplifies the project, restricting the scope and detail of the CEQA document that is required. Without a detailed, accurate project description, the CEQA process cannot yield accurate, clear results, thus frustrating review by the public. *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 192 (1977). The "project" that must be described includes everything needed for implementation of the overall action. CEQA Guidelines § l5003(h). To comply with CEQA, the Board must "[d]escribe the whole action involved, including but not limited to later phases of the project, and any secondary, support, or offsite features necessary for its implementation." CEQA Guidelines, Appendix G.

  - The Board must perform the "functional equivalent" of a rigorous and detailed EIR. *Envtl. Prot. Info. Ctr. v. Johnson*, 170 Cal. App. 3d 604, 618 (1985).

  - The Board must incorporate SONGS' existing environmental mitigation programs into the environmental baseline.

  - The environmental and cumulative impacts are grossly understated. *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692,712-18 (1990) (EIR overturned in part because lead agency failed to consider secondary or indirect impacts of project).

  - It is infeasible for the Board to approve a project that would require cooling towers to be built at SONGS, which would significantly impact environmentally sensitive habitat near SONGS in which the California Coastal Commission and United States Secretary of Commerce refused to allow construction of a toll road. Attachment 9, Decision and Findings by the U.S. Secretary of Commerce In the

> Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency From An Objection By the California Coastal Commission, December 18, 2008.

F. The Policy is void for vagueness and violates due process.

California courts consistently have held that "due process of law is violated by 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Britt v. City of Pomona*, 223 Cal. App. 3d 265, 278 (1990) (quoting *Connally v. General Const. Co.*, U.S. 385, 391) (1926); *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 347 (1985) (same). Due process requires the prohibition or regulation to be clearly defined in order to provide fair notice to the public and to avoid arbitrary and discriminatory application of the standard. *Britt*, 223 Cal. App. 3d at 347; *People v. Townsend*, 62 Cal. App. 4th 1390, 1400 (1998) ("A statute must be definite enough to provide a standard of conduct for its citizens and guidance for the police to avoid arbitrary and discriminatory enforcement."). The regulated community also must be given clear standards as to how it will be regulated, what is being regulated, and what standards will apply so as to provide fair notice and avoid arbitrary and discriminatory application of the standards. *See Townsend*, 62 Cal. App. 4th at 1400.

Under these principles, the Policy is unconstitutionally vague and does not provide fair notice to the regulated community. In particular, the Policy is vague and ambiguous as it relates to the following requirement found in Sections 3.D.(8):

> …The State Water Board shall establish alternative requirements *no less stringent than justified* by the wholly out of proportion (i) cost and (ii) factor(s) of paragraph (7)… (Emphasis added.)

The "no less stringent than justified" language is not defined by the Policy and is facially vague. This standard ostensibly establishes the level of compliance if alternative compliance requirements are set under Section 3.D.(7), but the regulated community is not provided a clear standard for how the "no less stringent" requirement will be applied. Any mitigation requirement must bear an essential nexus to the impact and be roughly proportional to the impact. The U.S. Supreme Court found that there must be an "essential nexus" between a legitimate state interest that is advanced by a regulation and the permit condition exacted by the agency. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). The U.S. Supreme Court further clarified that there must be "rough proportionality" between the condition imposed and the impact created by the activity. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The California Supreme Court has found that even where a mitigation fee satisfies the "essential nexus test," there must be a sufficient degree of information in the record to support a determination that a fee satisfies the "rough proportionality" test. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 885 (1996). It would be unlawful for the Board to require mitigation that was not roughly proportional to the impact and supported by

substantial evidence, or that has no essential nexus to the impact. It is impossible to determine whether these standards are met because the "no less stringent" requirement is so poorly defined.

Furthermore, it is unlawful for the Board to use the programmatic economic analysis completed by Tetra Tech for the SED to form the basis of this standard because the Tetra Tech analysis expressly does not apply to specific facilities.[18] By the same token, the Board acts in an arbitrary and capricious fashion by claiming that the Tetra Tech report supports a conclusion that "[r]etrofitting the State's two nuclear-fueled facilities is problematic, although not infeasible . . . ." SED, p. 62. In fact, the Tetra Tech report concludes that it "does not reach any overall conclusions regarding site-specific feasibility determinations." Tetra Tech, California's Coastal Power Plants: Alternative Cooling System Analysis, Feb. 2008, p. ES-6. SCE's May 2008 Comment Letter, incorporated by reference, describes in detail that it is infeasible to install wet cooling towers at SONGS due to a number of reasons, including: (1) the presence of environmentally sensitive habitat and wetlands where the cooling towers are designed to go; (2) SCE does not own any of the land on which SONGS sits, but leases it from the Navy; (3) SONGS is surrounded by a popular state park, through which the California Coastal Commission recently rejected the construction of a toll road.

Sections 3.D.(7) and (8) are also vague and ambiguous as related to costs. Section 3.D.(8) references "costs" based on the factors in Section 3.D.(7), but does not clarify if the non-monetary factors set forth in Section 3.D.(7) should be monetized and considered "costs." *See id.* The Board must revise the Policy to make it clear that alternative compliance alternatives can be provided based on monetary factors *or* the non-monetary factors listed in Section 3.D(7). The Board must clearly define its cost basis for determining Track 1.

In addition, the revised Policy eliminates any definition of "feasibility." Without a defined feasibility standard, the special studies process becomes vague and ambiguous. *See generally Connally v. General Const. Co.*, 269 U.S. 385 (1926) ("a statute [with] terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"); *People v. McCaughan*, 49 Cal. 2d 409, 414 (1957) (same). A time-tested definition of feasibility that SCE supports would be the CEQA definition. *See* Pub. Res. Code § 21061.1 ("'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors."); *see also* CEQA Guidelines § 15364 (reiterating this definition and adding "legal" to the list of factors).

[18] Tetra Tech, California's Coastal Power Plants: Alternative Cooling System Analysis, Feb. 2008, p. ES-6 ("This study does not reach any overall conclusions regarding a site-specific feasibility determination").

II. The Policy Impermissibly Ignores Extensive Mitigation Efforts By The Nuclear Plants.

A. It is arbitrary and capricious not to apply prior state-mandated mitigation to nuclear plants' ability to show Track 2 compliance.

To show compliance with Track 2, the Policy now makes a special exception for existing power plants with combined-cycle power-generating units ("CCGTs"). The Policy allows those plants – and only those plants – to count permitted discharges as prior entrainment reductions "where the CEC and/or a Regional Water Board imposed mandatory mitigation requirements (such as expenditures of substantial funds for habitat restoration or enhancement) based upon substantial evidence in the record of the prior proceeding showing that the [agency] required mitigation after a BTA determination . . . and required the mitigation to further offset the entrainment impacts . . . " Policy, § 2.A.(2)(d).

This selective application to CCGTs alone, and not to the nuclear plants, is unsupported by any rational basis to make this distinction. The SED recognizes *both* existing CCGTs *and* nuclear plants as "special cases requiring alternative requirements." SED, p. 93. Yet the SED provides no explanation for why CCGTs will be permitted access to an exception not available to nuclear plants, which also have been subjected to mandatory mitigation requirements imposed by a state agency. *See* SED, pp. 93-94 (no explanation provided for CCGT credit for mandatory mitigation).

The Board's decision to permit the CCGTs alone to claim credit for state-imposed mitigation requirements is reviewable under the arbitrary and capricious standard under both California and federal law. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."). While a reviewing court is not permitted to substitute its judgment for that of the agency, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . ." *Id.*

The Board has offered no explanation in the record to show why nuclear plants with state-imposed mitigation requirements cannot also take advantage of the special exception for CCGTs set forth in the Board's Policy at Section 2.A.(2)(d).

B. The SED commits CEQA error by failing to include extensive mitigation already performed.

Contrary to the California Supreme Court's recent decision in *Communities for a Better Env't v. South Coast Air Quality Mgmt. District* ("*CBE*") and a "long line of Court of Appeal decisions hold[ing] . . . that the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis . . .", the SED continues to commit baseline error by failing to compare the

impacts of the Policy to the physical environmental conditions surrounding the OTC plants. *CBE*, 48 Cal. 4th 310, 2010 WL 890960 *5 (Mar. 15, 2010) (citing cases).

This baseline error occurs because the SED only describes the effects of impingement and entrainment from the OTC plants, while failing to describe the environmental setting as a whole in the relevant study areas for the OTC plants. SED at 31. Instead of carefully describing the environmental setting, the SED relies on broad assertions that "consensus among regulatory agencies" and "documented examples of significant impacts from OTC on aquatic communities" sufficiently describes the actual environmental conditions that exist. SED, p. 29. This is not the law. The implementing CEQA regulations direct the Board to "include a description of the physical environmental conditions in the vicinity of the project," and state that "[t]his environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant."[19] CEQA Guidelines § 15125(a). Nothing in Public Resources Code Section 21159 relieves the Board of establishing this critical baseline. In fact, Section 21159(a)(1) makes clear that the Board must analyze "the reasonably foreseeable environmental impacts of the methods of compliance," which presupposes a valid CEQA baseline.

At minimum, the SED must describe the environmental setting surrounding the OTC plants so that the environmental impacts of the Policy can be adequately judged for significance. For example, the SED considers the relevant study area for entrainment and impingement at the San Onofre Nuclear Generating Station ("SONGS") to be "the entire nearshore of the Southern California Bight." SED, p. 31. In turn, the relevant entrainment and impingement study area for Diablo Canyon is a similarly large area, estimated to be "an area of roughly 93 square miles . . . ." *Id.* While the Draft Final SED tallies impingement and entrainment impacts for these areas, it does not describe how the marine environment functions, or provide any other environmental setting information (with the exception of a scant two-page description of criteria air pollutants and greenhouse gases). *Id.* at 15-44.

The SED's baseline error is particularly acute at SONGS, where the SED fails to account for extensive mitigation required by the California Coastal Commission ("CCC"), and extensive investigation into the condition of the marine environment. SCE's May 2008 comment letter described these environmental conditions in detail, including the mitigation measures (which the CCC found to eliminate all remaining marine impacts from the facility's OTC system).

The SED never recognizes this baseline error because it also fails to analyze environmental impacts associated with the CEQA-mandated "no project" alternative. CEQA Guidelines § 15126.6(e). CEQA explains that the lead agency should analyze the "no project" alternative's impacts "by projecting what would reasonably be expected to occur in the foreseeable future if the project were not approved . . . ." CEQA Guidelines

[19] SCE's prior comment letters have repeatedly made this point. *See* Michael M. Hertel, PhD, September 30, 2009 Comment Letter, p. 29, Sec. VI.B.4; Michael M. Hertel, PhD, May 20, 2008 Comment Letter, p. 8, Sec. V.B.

§ 15126.6(e)(3)(C). An agency's failure to include a "meaningful consideration of the 'no project' alternative" constitutes a prejudicial abuse of discretion for not "proceed[ing] in accordance with procedures mandated by law . . . ." *Mountain Lion Found. v. Fish and Game Comm'n.*, 16 Cal. 4th 105, 137 (1997) (overturning environmental document prepared pursuant to a certified regulatory program).

C. CWA Section 316(b) does not support the Policy's application to SONGS because there is no need to minimize "adverse environmental impact."

The Policy fails to account for SONGS' extensive prior mitigation previously mandated by the CCC, which has already minimized any "adverse environmental impact" caused by entrainment and impingement prior to consideration of the Policy. *See* Michael M. Hertel, PhD, May 20, 2008 Comment Letter, pp. 1-2, 4-5, Sections I.A, III. At minimum, the Board has an obligation to consider this prior mitigation when determining the extent to which "adverse environmental impacts" have already been minimized.

Riverkeeper II is not dispositive on this issue, because it did not consider whether mitigation imposed *prior to* analyzing cooling water intake structures under Section 316(b) could be counted towards determining whether there was an "adverse environmental impact" to be minimized in the first instance. *See Riverkeeper II*, 475 F.3d at 124-26. In *Entergy*, the Supreme Court took pains to distinguish between the varying levels of technological standards set forth in the CWA. *Entergy*, 129 S. Ct. at 1506-07. In particular, Section 316(b) differs from the other CWA standards in that it applies to the BTA "for *minimizing* adverse environmental impact." 33 U.S.C. § 1326(b) (emphasis added). This choice of terms indicates that efforts to minimize "adverse environmental impact" caused by entrainment and impingement prior to Section 316(b) application should be given effect. *But cf. Riverkeeper II*, 475 F.3d at 125 n.36 (interpreting Section 316(b) not to limit "'adverse environmental impact' to population-level effects").

An analogy can be drawn here to CEQA case law, where mitigation to reduce an environmental impact below a level of significance for a prior project can be counted for a subsequent project, so long as that prior mitigation also reduces the potentially significant environmental impact for the subsequent project. *See, e.g., Sierra Club v. City of Orange*, 163 Cal. App. 4th 523, 542 (2008) ("[i]n approving the [EIR], the city council incorporated project design features 'expand[ing] and improv[ing] upon the mitigation measures required in [the prior EIR]'").

The Policy itself provides no mechanism for accounting for extensive prior mitigation to address "adverse environmental impact" related to entrainment and impingement at SONGS. The Board has an obligation under Section 316(b) to consider prior mitigation to address "adverse environmental impact." Therefore, the Board's Policy should be revised to account for the extensive prior mitigation already mandated by the CCC, which has already minimized "adverse environmental impact" caused by SONGS entrainment and impingement prior to consideration of the Policy. The Policy is

unlawful as proposed for failing to account for the absence of environmental impact to be minimized at SONGS.

III. The Policy Impermissibly Sets Compliance Deadlines for the Nuclear Facilities Without Performing the CEQA-Mandated Analysis of Mitigation Measures and Alternatives

The Board is required to develop and analyze any "reasonably foreseeable feasible mitigation measures" and any "reasonably foreseeable feasible alternative means of compliance" to the Policy that would result in fewer environmental impacts. Pub. Res. Code § 21159(a)(2) – (3); CEQA Guidelines §§ 15126.4(mitigation measures); 15126.6 (alternatives analysis).

In SCE's September 30, 2009, comment letter, SCE cited the Environ Report for the principle that the SED did not analyze several reasonably foreseeable alternative methods of compliance. September 30, 2009, comment letter, pp. 34-35.

In blatant disregard of these core CEQA duties, the Policy continues to defer development and analysis of reasonably foreseeable mitigation measures and alternatives to the Policy until a future time after an independent third party will prepare "special studies [to] investigate alternatives for the *nuclear-fueled power plants** to meet the requirements of [the] Policy . . . ." Policy, Secs. 3.D.(1) – (2). Not only does CEQA and the CEQA Guidelines facially prohibit this type of deferral of analysis, but also the California Supreme Court has spoken directly on this issue.

In *Vineyard Area Citizens for Responsible Growth, Inc.*, the Court rejected an attempt to "tier from a *future* environmental document . . . as legally improper under CEQA." 40 Cal. 4th at 440. There, despite the fact that the relevant water agency's master plan update was still pending, the City's final EIR relied on the water agency's future analysis to substantiate the project's water supply discussion. *Id.* Rejecting this approach, the Court explained that the City had two choices: first, perform the same water analysis that the water agency was in the process of performing, or second, defer approval of the project at hand until the water agency's update was published. *Id.* The Court explained, "[w]hat the [agency] could not do was avoid full discussion of the likely water sources for the . . . project by referring to a not yet complete comprehensive analysis . . . ." *Id.* at 440-41. "CEQA's informational purpose is not satisfied by simply stating information will be provided in the future." *Id*. at 441 (internal citation omitted).

Here, the Board continues to defer critical information past the Policy's approval date by relying on future "special studies" to develop mitigation measures and alternatives for the nuclear-fueled plants, while setting a compliance schedule for the nuclear-fueled plants and applying the Policy to them. The Policy, as revised, compounds this error by requiring the Board to delay its consideration of the Policy's effects on the nuclear-fueled plants until after the special studies are developed. Policy, Sec. 3.D.(7) – (8).

As explained by the California Supreme Court, this is impermissible under CEQA. Instead, the Board has two choices: (1) delay approval of the Policy until after the special studies are performed and the requisite mitigation measures and alternatives analyses are performed, or (2) exclude the nuclear-fueled plants from consideration under the Policy.

IV. The Policy Is An Impermissible Hybrid of Quasi-Legislative and Quasi-Judicial Action

The stated goal of the Board is to "establish a uniform regulatory approach that will further Porter-Cologne's mandate to attain the highest reasonable water quality possible for use and enjoyment of the people of the state," which includes establishing "technology-based performance standards that will implement CWA § 316(b) and replace the 35 year old interim ["Best Professional Judgment"]-permitting approach." SED, pp. 14-16.

Given these statements, it is clear that the Board has chosen to proceed in a quasi-legislative rulemaking, and therefore, may not engage in adjudicatory analysis specific to one entity or another. *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974) (it is an abuse of discretion to engage in quasi-adjudicatory proceeding if it denies affected parties an opportunity to be heard). In fact, it is an abuse of discretion for an agency to perform adjudicatory functions specific to a single entity in the course of a quasi-legislative rulemaking proceeding. *Id.*

When an agency engages in an adjudicatory proceeding that places a party's property interests at stake, however, constitutional due process principles require that the agency provide an individual hearing, with the right to present and rebut evidence. U.S. Const. Amend V. A hallmark of a quasi-adjudicatory proceeding is the receipt and weighing of evidence.

The Policy has become an impermissible hybrid of quasi-legislative rulemaking and quasi-judicial adjudication of facts. In particular, the Policy establishes a compliance period for the nuclear-fueled plants and establishes a cost baseline that the "special studies" will be evaluated against. *See* Policy, Secs. 3.D. – E. In addition, the SED contemplates specific siting requirements for cooling towers at SONGS, another project-level adjudicatory function. SED, pp. 62-63. All of these actions require fact-finding specific to the nuclear-fueled plants, a hallmark of quasi-adjudicatory proceedings, however, the nuclear-fueled plants have been provided no individual hearing, with a right to present and rebut evidence.

There is a significant property interest at stake because Enercon has calculated that Tetra Tech "significantly underestimated" the losses SCE would incur resulting from SONGS outage required to install cooling towers. Attachment 10, April 13, 2010 Enercon Comment Letter, p. 6. The difference between the Enercon outage calculation and the Tetra Tech calculation is over $1.8 Billion. *See* Attachment 11, Enercon Report, Feasibility Study For Installation of Cooling Towers At San Onofre Nuclear Generating Station, Table 1.1, p. 5.

By engaging in a hybrid, quasi-legislative and quasi-adjudicatory proceeding, without providing the nuclear-fueled plants an opportunity for an individual hearing, with a right to present and rebut evidence, the Board has abused its discretion and violated due process principles.

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